Supreme Court of the United States.

October Term, 1904.

No. 208.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In error to the Supreme Court of the State of Pennsylvania.

PAPER BOOK OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Pennsylvania Revenue Statute, approved June 8, 1891, and found in the published laws of Pennsylvania for that year, commencing at page 229, taxes the property of domestic corporations and also of foreign corporations "having capital or property employed or used in this Commonwealth" at the rate of 5 mills, as-

sessed upon a cash valuation of capital stock to be made between the 1st and 15th days of November in each year.

The Plaintiff in Error, the Delaware, Lackawanna and Western Railroad Company, is a corporation of the State of Pennsylvania, but under authority of law having its principal office and place of business and treasury in the City and State of New York. It owns certain railroads and leases others so that the line which it operates extends from Hoboken, New Jersey, through Pennsylvania, to Buffalo, New York. It is authorized by its charter (granted prior to the adoption of the present Constitution of Pennsylvania) not only to operate railroads, but also to mine and buy and sell coal. It owns and operates extensive coal mines in Pennsylvania, and is largely engaged in mining and selling coal, most of which is sold and delivered at points outside of Pennsylvania. A large part of the coal is sold or contracted for before it leaves the mines, or shortly thereafter. Its sales of this character in 1899 amounted to $18,587,258. The amount of such sales, however, is not drawn in controversy in this case. But in addition to such sales the company also maintains at Buffalo, New York; Chicago, Illinois; and certain points in other States and in Canada, yards for the sale of coal at retail. At the tax appraisal period, in 1899, the company had in stock in its yards at Buffalo, New York; Chicago, Illinois; and points in Michigan, New Jersey, and Canada, coal of the value of $1,702,443.

The par value of the company's capital stock is $26,200,000, but its appraisement for 1899 amounted to $48,-

470,000. In returning this appraisement to the Auditor General the company did not specify the items for which it claimed deductions, and that officer assessed the tax of 5 mills upon the entire valuation of $48,470,000, the tax amounting to $242,350. From the settlement of this account by the Auditor General and State Treasurer the company, as permitted by law, appealed to the Court of Common Pleas of Dauphin County (that being the county in which the seat of government is located) and produced evidence showing that its valuation included certain railroads, or interests in railroads in other States, also railroad equipment, real estate, tugs and barges and other property located and used in States other than Pennsylvania, including coal of the value of $1,702,443, stored in its retail yards at Buffalo and other points, as aforesaid. Upon the trial of the case, deductions were made of the value of the other items of property, real and personal, outside of Pennsylvania, including the real estate used for yards for the storing of the coal at Buffalo and other points, but the item of coal—the coal itself—$1,702,443, was made the subject of a reserved point. All other matters in controversy were disposed of by the entry of a verdict whereby the tax was reduced to $102,737.79, leaving the question of the taxibility of the coal to be determined by the Court without the intervention of a jury, under the Pennsylvania Statute of April 22, 1874, the Court to find both the law and the facts. The trial court concluded that "there was no assessment of a tax upon the real estate lying beyond the limits of the State, upon which the coal was placed, because it was permanently located beyond the taxing jurisdiction of the

Commonwealth, and never subject to the visatorial power of the Auditor General or any other authority.

"But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the actual valuation and assessment was paid thereon, is quite a different proposition."

Speaking further of the coal, the learned trial judge said—"After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing to-morrow —fugitive ever until it reaches the torch.

"By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it; and the product transported for sale to other States ought to be exempt from further taxation there for State purposes."

He therefore sustained its taxibility in Pennsylvania, notwithstanding the fact that the evidence showed that the coal had been taxed for both State and local purposes in the other States where located and held awaiting sale, and entered judgment for the 5 mills tax, amounting to $8,512.21, with interest and Attorney General's commission added, making a total judgment of $9,883.71.

That judgment was, upon appeal, sustained by the Supreme Court of Pennsylvania, to which this writ of error has been taken.

ASSIGNMENT OF ERRORS.

*1. The learned Court erred in not sustaining the company's first exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"1. The learned Court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz:

" '1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The Acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them do they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

2. The learned Court erred in not sustaining the company's second exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"2. The learned Court erred in not sustaining the second objection specified in defendant's appeal, said objection being as follows, viz:

" '2. Appellant's system of railroads is partly in

*Note. The errors assigned in Nos. 1, 2, 3 and 4 relate only to the coal, the company's claims as to the other items of property, real and personal, all having been allowed and the value thereof deducted from the appraisement by the State Courts.

Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The Acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other Act of Assembly contemplate the taxation of railroads, interest in railroads, and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

3. The learned Court erred in not sustaining the company's fourth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"4. The learned Court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

" '4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the Auditor General's department, sanctioned by the Courts, of apportioning the taxes according to the respective proportions of capital stock invested in and out of the State, and is, for that reason, in violation of Section 1 of Article IX. of the Constitution of Pennsylvania and of Section 1 of Article XIV. of the amendments to the Constitution of the United States.' "

4. The learned Court erred in not sustaining the com-

pany's fifth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"5. The learned Court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

" '11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The Acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or either of them are in violation of the necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

5. The learned Court erred in not sustaining the company's sixth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"6. The learned Court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

" '12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States, which limits the taxing authority of each State to subjects within its territorial limits.' "

6. The learned Court erred in not sustaining the company's seventh exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"7. The learned Court erred in its answer to the third point submitted by defendant, said point and answer thereto being as follows, viz:

" '3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.' "

"Answer. 'Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.' "

7. The learned Court erred in not sustaining the company's eighth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"8. The learned Court erred in its answer to the fourth point submitted by defendant, said point and the answer thereto being as follows, viz:

" '4. The taxation of coal, or capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

"Answer. 'Refused for reasons given in the general opinion.' "

8. The learned Court erred in not holding that the taxation by the State of Pennsylvania of coal mined within the State and shipped into other States and there stored for the purposes of sale is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which provides that Congress shall have the

power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

9. The learned Court erred in affirming the judgment of the Court of Common Pleas of Dauphin County in favor of the Commonwealth of Pennsylvania and against the Delaware, Lackawanna & Western Railroad Company.

10. The learned Court erred in not reversing the judgment of the Court of Common Pleas of Dauphin opinion.' "

BRIEF OF ARGUMENT OF APPELLANT IN ERROR.

I. The Tax Claimed is a Tax on Property.

The tax sought to be recovered by the Commonwealth of Pennsylvania is a tax upon the property of corporations having capital stock. The existing law is found in the Pennsylvania statute approved June 8, 1891, and appears in the published laws of Pennsylvania for that year commencing at page 229. It is entitled:

"An Act to provide increased revenues for the purpose of relieving the burdens of local taxation, being supplementary to an act, entitled 'An Act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the first, fourteenth, sixteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth sections of an act supplementary thereto, which became a

law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled 'A further supplement to an act entitled 'An Act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine,' and providing for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value."

The rate of tax theretofore had been three mills upon an appraisement of values, except in certain cases where the rate of the tax was determined by the amount of dividends declared. But, in the preamble of the Act of 1891, it is set forth that—

"It appears that the taxes imposed upon corporations and individual citizens by the first and twenty-first sections of said act can be made much more nearly uniform by taxing all corporations, limited partnerships and joint-stock associations having capital stock at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds; therefore."

The 4th section of the Act of 1891 amends the 20th section of the Act of June 1, 1889, so as to read—

"That hereafter, except in the case of banks, savings institutions and foreign insurance companies, it shall be the duty of the president, chairman or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or

organized by or under the laws of any other State or territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint stock association, company or corporation whatsoever, association or associations, co-partnership or co-partnerships, person or persons, or in any other manner, to make a report in writing to the Auditor General, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.

Second. Total authorized number of shares.

Third. Number of shares of stock issued.

Fourth. Par value of each share.

Fifth. Amount paid into the treasury on each share.

Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following-named officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fi-

delity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less however than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the Auditor General a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: *Provided*, That if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership, for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal."

The 5th section of the Act of 1891 amends the 21st section of the Act of 1889, so as to read as follows—

"That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock, of all kinds, including common, special and preferred, as ascertained in the manner prescribed in said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of the settlement of the account by the Auditor General and State Treasurer: *Provided*, That for the purpose of this act interests in limited partnerships or joint-stock associations shall be deemed to be capital stock and taxable accordingly: *Provided also*, That corporations, limited partnerships and joint-stock associations liable to tax on capital stock under this section, shall not be required to make report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right, but corporations, limited partnerships and joint-stock associations holding such securities as trustees, executors, administrators, guardians or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further*, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations, organized exclusively for manufacturing purposes and actually carrying on manufacturing within the State, excepting companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain: Provided *further*, In case of fire and marine insurance companies the tax imposed by this section shall be at the rate of three mills upon each dollar of the actual value of the whole capital stock."

The amendatory Act of June 8, 1893, Laws of Pennsylvania, 1893, page 353, makes a change in one of the provisos relating to manufacturing companies, but has no bearing upon the present controversy.

The Act of 1891 was before the Supreme Court of Pennsylvania in *Commonwealth of Pennsylvania* vs. *New York, Pennsylvania & Ohio Railroad Co., 188 Pa., 169.* In that case the company endeavored to resist the payment of the tax upon the ground that, by reason of its great indebtedness, its shares were of no value. The Auditor General estimated the value of the property to be something over $34,000,000. The trial court found the value of the property to be $15,000,000, and assessed the tax upon that basis. Mr. Justice Dean delivering the opinion of the Supreme Court said (p. 188):

"The defendant appraises its capital stock as of no value whatever; the Commonwealth appraises it at $34,480,577.70, the Court below appraises it at less than half that amount. The main dispute between the Commonwealth and defendant is as to the construction of the Act of 1891. It may be conceded at once, that the legislative intent to levy the higher amount must be expressed or result from necessary implication, for if in a tax law the intent be doubtful it does not exist. The title of the act declares the purpose to be to tax 'all the property of corporations, limited partnerships and joint-stock associations having capital stock, at the rate of five mills on each dollar of its actual value.' Could legislative language be plainer? All the property of corporations is to be taxed at the rate of five mills on each dollar of its actual value. The words 'having capital stock' are used to distinguish such corporations from beneficial, religious and other corporations having membership, but not capital stock representing the respective interests of members in the corporate prop-

erty. Then, preamble six of the act further declares it to be the purpose to tax 'All corporations, limited partnerships and joint-stock associations having capital stock, at a fixed rate of five mills on each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest as their franchises and property of other kinds.'

"In *Commonwealth* v. *Standard Oil Co., 101 Pa., 119*, speaking by Paxson, *J.*, this Court held: 'It has been repeatedly decided and is settled law that a tax upon the capital stock of a company is a tax upon its property and assets.' Then in *Fox's Appeal, 112 Pa., 354*, it is said: 'The capital stock is nothing; a myth, a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the Courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.' In *Commonwealth* v. *Delaware, Susquehanna & Schuylkill R. R. Co., 165 Pa., 44*, opinion by McCollum, *J.*, we said: 'In ascertaining the actual value of the capital stock, was it proper to take into consideration, affecting that value, the franchise of the company? We think this question is affirmatively answered by the Act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchises in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it.' There are other cases to the same effect. The statute having thus, in express terms, declared the subject of taxation to be all the property of corporations having capital stock, and the settled interpretation by this Court of a tax on capital stock of a corporation being, that it is a tax upon all the property of the corporation, it is clear that the learned judge of the Court below committed no error in the first sentence of his conclusion of law, thus: 'A

tax on the capital stock of a corporation is a tax upon its property and assets, including its franchises.' "

And again at page 190, the learned Justice says:

"The contention of appellant's counsel, in substance is, that to ascertain the actual value, there should be deducted the amount of the corporation indebtedness from the aggregate fairly appraised value of the corporate property; the remainder would then represent the actual value of the capital stock. This would, in many cases, hide the tangible property and turn the Commonwealth over to the assessment and collection of its revenues from nothing; in the face, too, of what we have repeatedly decided, that a tax upon the capital stock of a company is a tax upon its property and assets. The legislature might have so worded the statute that such result as that contended for would follow, namely, that solvent corporations should pay taxes and insolvent ones not; but, with our decisions in 1882 and 1886, and the declared law long preceding them, that capital stock in taxing statutes meant the property and assets of the corporation before them, they declared, in the Act of 1891, precisely to the contrary. In fact, from the wording of preamble six of the Act of 1891, we do not doubt, that at least the framer of the act was familiar with the opinion of this Court in *Com. v. Oil Co., supra.*

"In supporting their argument on each side, counsel have given undue significance to the indebtedness of the corporation; strictly speaking, in view of the purpose of this statute, the debt is almost as much of a myth as the certificate of capital stock. The declared purpose is to tax the capital stock by ascertaining its value in view of the tangible assets of corporations, what was owing to them, the value of their franchises and the rights and privileges they possessed under their grants. The Commonwealth no more sought by the Act of 1891 to ascertain and tax the net assets of these artificial beings, than by the usual tax laws, she seeks to tax the net assets of natural ones; in the latter case

she rarely inquires as to what the taxpayer owes; she does ask what he is possessed of; it is only when the attempt is made to tax his creditor that, incidentally, what is owing by the debtor becomes of interest to the taxing power. We have no hesitation in holding that it would be manifest error to adopt the amount of the debt as a part of the value of the corporate property; and it would be just as erroneous to hold that it should be deducted from the aggregate value of the property, and thereby withdraw tangible property to that extent from taxation; in either case it would be dragging in a fact of but slight consequence, and making it the prominent and controlling one in the issue, in the face of the declared purpose of the statute to tax the actual value of the capital stock, as indicated by the franchises and property."

The tax had always, under the earlier acts, been construed as a tax upon property.

"It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets." *Com.* vs. *Standard Oil Co., 101 Pa., 145.*

"It merely taxes its property, that is, its capital stock, to the extent that it brings such property within its borders in the transaction of its business." *Ibid., 146.*

"The power of taxation is limited to subjects within the jurisdiction of the State, and it was not the intent of these acts to tax the whole capital stock of foreign corporations, irrespective of the place of its investment, but to tax the property of such company, that is, its capital stock, to the extent that it brings such property within the State in the transaction of its business." *Ibid., 120.*

And see *Bank of Commerce* v. *New York City, 2 Black, 620.*
Bank Tax Case, 2 Wall., 200.

II. IT WAS NEITHER WITHIN THE INTENT, NOR THE POWER, OF THE LEGISLATURE OF PENNSYLVANIA TO IMPOSE A TAX UPON TANGIBLE PROPERTY NOT WITHIN HER TERRITORIAL LIMITS NOR THE PROTECTION OF HER LAWS.

No Pennsylvania statute imposing this character of tax has ever borne evidence of any intention that it should have extra-territorial effect and the existing law in express terms confines its operation to corporations "having capital or property employed or used in this Commonwealth." These taxing statutes have always been construed as limited in their operation to property within the State, and taxable under its laws. Where it has been shown that the capital stock represented tangible property beyond the limits of the State or which, for any other reason, was not subject to State taxation, the Courts have always required proper deductions to be made, as in *Com.* v. *Standard Oil Co., supra.* That was a foreign corporation, but the same rule has invariably been applied to domestic corporations as well. Thus in *Commonwealth* v. *Delaware, Lackawanna & Western Railroad Company* (the present plaintiff in error), *145 Pa., 96,* it was, as stated in the syllabus, held that—

"The capital of such company, invested in real estate and other railroads outside the State, and in vessels, barges and tugs, built, registered and used wholly outside the State, is not subject to such taxation; the said property being already taxable in the States where it exists and is used."

In the same case it was held that railroad equipment consisting of locomotives and freight and passenger cars owned by the Pennsylvania corporation but used

upon roads operated by it in other States, was not taxable in Pennsylvania, and the cars, having been used interchangeably upon roads within and without the State, the amount of the deduction upon that account was ascertained upon a mileage basis. The total value of equipment owned by the company was found to be $8,134,823, and the value of equipment owned by the company for use upon its roads outside of Pennsylvania was, upon the mileage basis, found to be $3,059,481, which amount was deducted in ascertaining the taxable valuation (p. 98).

In *Commonwealth* v. *Pennsylvania Coal Company* and *Commonwealth* v. *National Transit Company*, argued together, (not found in State reports but reported in note to *Com.* v. *Montgomery Lead & Zinc Mining Co., 5 Pa. County Court Reps., 89*), the Supreme Court of Pennsylvania held that United States bonds, not being taxable under the laws of Pennsylvania, must be deducted from the valuation in imposing the tax on capital stock and that pipe lines, engines, machinery, tanks and rights in other States must also be deducted, saying, in a *per curiam* opinion, that "It was correctly held by the learned judges in the Court below that so much of the tangible property of the corporation as was situate in other States and there employed in their corporate business was not taxable here."

In *Com.* vs. *Westinghouse Electric & Manufacturing Co., 151 Pa., 265*, it was held that the tax on capital stock, being a tax on property, could not be applied to so much of the capital stock as represented United States patents. The trial judge said (p. 270):

"Being upon the capital stock, it is a tax upon the company's property and assets: *Com.* v. *Standard Oil Co., 101 Pa., 119; Fox's Appeal, 112 Pa., 354;* and is, therefore upon the patent rights themselves, whether they are original patents or assignments or grants or licenses. * * * * * Considered, therefore, as a tax upon the right itself, we think it cannot possibly be supported, because it restrains and interferes with a right granted by Congress in the exercise of power exclusively committed to the Government of the United States by the Federal Constitution."

And Mr. Justice Heydrick, writing the opinion of the Supreme Court, said (p. 275):

"Part of its capital is invested in patent rights, and that it is not taxable upon that part is so clearly and forcibly shown by the learned Court below as to render further discussion of that subject undesirable. It is equally clear that it is not taxable upon another part invested in manufacturing plants situated in New York and New Jersey. This, however, is not controverted. But in addition to the items upon which tax was imposed by the judgment of the Court below it is taxable upon so much of its tangible property as is situated in this Commonwealth."

In *Commonwealth* v. *American Dredging Company, 122 Pa., 386,* it was ruled, as stated in the syllabus, that—

"1. A corporation is not liable to taxation in this State upon so much of its capital stock as is represented by real estate situated, or by personal property of a corporeal nature ordinarily kept, in another State.

"2. The rule, however, as to its vessels engaged in foreign or inter-state commerce, is that their situs for the purpose of taxation is their home port of registration.

"3. But, its unregistered vessels, not permanently located, in one place to-day and in another to-morrow,

have their situs for taxation in this State, the domicile of their owner."

In sustaining the tax upon $92,000 worth of stock represented by four barges, a tug-boat and eleven scows, not registered, Mr. Justice Paxson, delivering the unanimous opinion of the Court, said (p. 390):

"This is not because of the technical principle that the situs of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property such as bonds, mortgages, and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another State. In such cases, it is taxable within the jurisdiction where found and is exempt at the domicile of the owner. Goods and chattels, horses, cattle, and other movable property of a visible or tangible character are liable to taxation in the jurisdiction of the State wherein the same are, and are ordinarily kept, irrespective of the residence or domicile of the owner. Legal protection and taxation are reciprocal, so that such personal property and effects of a corporeal nature, or that may be handled and removed, as receive the protection of the law are liable to be taxed by the law where they are thus protected: *Rorer on Inter-State Law, 204,* and cases there cited; *Potter on Corporations, Secs. 139, 190; Pierce on Railroads, 472.* No fault is found with this principle."

It was held, however, that the principle did not apply to four dredges, a tug-boat and eleven scows involved in that case for reasons which will be hereinafter stated.

From what has been said it will appear that the Pennsylvania Courts have invariably ruled that the statutes of that State taxing capital stock were not intended

to and cannot, in any event, constitutionally be made to apply to tangible property, whether real or personal, so located within another State or country as to be subject to its laws and taxable there. Indeed, this rule is recognized by the Pennsylvania Courts in the very case at bar, and deductions have been made for every item of tangible property, both real and personal, owned by the company outside of Pennsylvania, except the item of coal in controversy. The undisputed evidence of the company's treasurer (Record, p. 21) shows that its equipment was of the value of $7,891,217, most of which was used in operating roads owned or leased to, and operated by the company outside of Pennsylvania, and that the value of the equipment owned and used in Pennsylvania was $1,986,219. The difference between these two sums, representing the value of the equipment used outside of the State, was deducted in the Pennsylvania Courts, as was also $498,700, the value of two tugs, 59 coal barges and 14 schooner barges registered and used wholly outside of the State of Pennsylvania, (Record, p. 24), and real estate owned by the company in other States of the value of $1,195,907. (Record, p. 22). The only tangible property held outside of the State which the Pennsylvania Courts refused to deduct was the coal of the value of $1,702,443. The real estate upon which that coal was stocked was admitted to be not subject to taxation and was deducted, Judge Weiss, delivering the opinion of the trial court saying (Record, p. 30):

"Being a tax on property, it follows that the State cannot tax that part or portion of its property which is permanently located beyond her territorial limits."

And in the opinion of the Supreme Court (Record, p. 43) it is said:

"One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States, some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property."

In short, the principle is conceded that tangible corporeal personal property so located elsewhere as to be taxable in another State or country, is not taxable in Pennsylvania. But it is denied that the principle applies to the facts in this case. It is important therefore, to consider those facts.

III. The Coal in Question was permanently located, and actually taxed, in States other than Pennsylvania.

In the trial Court all matters in controversy were disposed of by the verdict of a jury except the taxability of the coal in question, concerning which it was agreed that it should be reserved from the verdict and submitted to the Court to find both the law and the facts, in accordance with the provisions of the Pennsylvania statute of April 22, 1874 (P. L., 109).

"Where a cause is submitted to the decision of the Court below without a jury under the Act of April 22, 1874, the findings of fact under such a submission are no more reviewable by the Supreme Court than is the

verdict of a jury." *Com. vs. Westinghouse Electric & Manufacturing Co., 151 Pa., 265.*

The facts found by the trial court, so far as material, are as follows:

"By the COURT. This case arose upon an appeal by defendant from an account for tax on capital stock for the tax year 1899, said account amounting to $242,350. Certain questions raised by the appeal having, by agreement of counsel been withdrawn from the jury and submitted for the determination of the Court without a jury, as if under the Act of April 22, 1874, we find the following facts:

"1. * * * * * The company, as authorized by a special act of Pennsylvania Legislature, has its general office and treasury in the City and State of New York, though its corporate home is in Pennsylvania. It is authorized by law to own coal lands in Pennsylvania, and to mine, buy and sell coal and convey the same to market; and, in addition to its business of owning and operating an extensive system of railroads, is engaged in the business of mining, buying and selling coal. The proper officers of the company returned and appraised its capital stock as of the actual value, between the first and fifteenth days of November, 1899, of $48,470,000, and in making up the claim of the State for taxes for said year, the Auditor General made no deductions whatever, but charged tax at five mills upon said aggregate valuation of $48,470,000, the said tax amounting to $242,350. Amongst other property in addition to its railroad, the company owned coal located at points outside of Pennsylvania, in New York, Illinois and other States of the value of $1,702,443, and, as already stated, no deduction was made by the Auditor General in his statement of account against the company for or with respect to this coal. All taxes assessed against the company for 1899 in other States, on coal located there have been paid, according to the belief and so far as the secretary of the company can now, May 25, 1901, recall.

"2. There were other items in dispute in addition to the coal, and they were covered by defendant's appeal, but the Attorney General, on behalf of the Commonwealth, and counsel for the defendant, entered into an agreement in writing as follows, viz:

" 'And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,443, being the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the Court. If the Court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21, being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual Attorney General's commission of five per cent., either of the parties to be at liberty to file exceptions to, and appeal from the decision of the Court upon the said reserved point with like effect as if the case had been tried by the Court without a jury under the Act of April 22, 1874.'

"3. The case having been submitted to the jury, a verdict was rendered as follows, viz:

'Tax,	$111,250 00
Less five mills on coal $1,702,443.00,	8,512 21
	$102,737 79
Less payment on account,	100,000 00
	$2,737 79
Add Attorney General's commission of 5 per cent.,	136 88
Verdict for,	$2,874 67'

"The judgment entered upon said verdict has been paid by defendant, leaving open only the one question submitted to the Court as aforesaid of the defendant's liability to taxation with respect to capital stock invested in coal located outside of Pennsylvania.

"4. The facts agreed upon by counsel for the Commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz:

" 'Under powers conferred by special charter previous to the adoption of the present Constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock

is required by law to be appraised for taxation was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the Auditor General's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. *On the contrary, said coal was intended to, and did become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899.* When the coal thus kept in stock in the States of New York, Illinois, and other States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the City and State of New York.

" 'In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after, its arrival at the points in other States to which it was to be delivered. What I have said above was with refference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.'

"5. The corporation defendant is authorized by law to transact business and to hold lands in other States for depot, wharfage and coal yard accommodations and to make such agreements and contracts with corporations and individuals of other States as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business and to hold its stockholders' meeting, in the State of New York, and to have as president, directors and other officers, non-residents of the State of Pennsylvania. The company is taxable upon the *value* of the property represented by its capital stock, and not upon the *amount* of the latter."

The evidence upon which, in its first finding of fact, the trial Court found the taxes assessed in other States to have been paid, is contained in the supplemental and undisputed affidavit of Mr. Chambers, the treasurer of the company (Record, p. 26), as follows:

"I am the secretary and treasurer of the Delaware, Lackawanna and Western Railroad Company. Referring to the taxes mentioned in my former affidavit in the above-entitled case, I desire to add that they have been paid, I believe. The company is not contesting, but on the other hand concedes the rights of New York, New Jersey, Michigan and Illinois, and the other States, and Canada, to tax coal located and stored in said States. The only question pending at present is as to the amount of valuation in the State of New York for 1899, and as soon as that valuation is definitely fixed the company will pay the tax without any question as to the authority of the State to levy the same. All taxes, so far as I can now recall, State and local, which have been assessed against this company for 1899, in any of the States mentioned, have been paid."

From the fact judicially found, the following important matters clearly appear:

1st. That the value of the coal, $1,702,443, "was included in the valuation of the company's capital stock upon which tax was charged in the Auditor General's account."

2d. That "the said coal, when shipped from Pennsylvania, was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to and did become part of the general mass of property in said other States and the company is there annually taxed

upon or in respect to the same and was so taxed for 1899."

3d. That the taxes, both State and local, assessed upon the coal in the States where located, have been paid.

4th. That the coal in other States was "stored in yards or upon docks maintained by the company for that purpose" and was there held "for purposes of sale" and as part of the company's stock in trade for that purpose, which purpose of selling coal is expressly authorized by its charter and is part of its corporate business.

5th. That "when the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the City and State of New York." But at the time the appraisement of capital stock was made, viz: Between the first and fifteenth days of November, 1899, the coal in controversy had not been sold. It was "on hand awaiting sale" at said points outside of Pennsylvania. It was destined never to return to Pennsylvania, and formed part of the general mass of property of the States where located, although it was not the intention of the company to retain permanent ownership of it.

Upon this state of facts, the Pennsylvania Courts have held that the principle so frequently enunciated by them, does not apply. But their reasoning is not convincing. Their theory seems to be that as the coal was awaiting sale it was not permanently located beyond the limits of the State. The learned trial judge said (Record, p. 30):

"It was transported to points in other States for temporary storage and immediate sale. It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose."

But this is contradicted by the sentence immediately following, in which he says that "It is a commodity dealt in by the company." When the corporate purpose of a company is to mine or purchase and sell coal, the coal so mined and sold or held awaiting sale does certainly serve the corporate purpose and is a thing used in the prosecution of the business of the company. He further says: "It may be, and doubtless was, transported from there (the place where held awaiting sale) to other States and places after it was sold." But as to that there is no finding of fact, nor any evidence. It is highly improbable that coal held in stock for the purpose of sale at retail is, after such sale, transported into other States. But what became of it after it was sold, is a matter of no consequence. It had not been sold at the time of the appraisement and taxation. When sold it became the property of somebody else and not of this company. The proceeds of sale were returned, not to Pennsylvania, but to its treasury in the State of New York. Wherever the coal may have gone after it parted from the ownership of the plaintiff in error, it certainly did not come back to Pennsylvania, for, being anthracite coal, the further from the mine, the more valuable it is, owing to the cost of transportation. At the mine this coal would not have been worth the price of return carriage. The trial judge further says (Record, p. 30):

"The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage back to its original domicile.

"It is this itinerant trait which likens the case to the dredges, tugs and scows in *Commonwealth* vs. *American Dredging Company, 122 Pa., 386,* employed beyond, but taxed within, the boundaries of this State; and subjects the coal to taxation in the parent jurisdiction, from whence it ought to go exempt from the imposition of further burdens elsewhere for State purposes for the year specified.

"That cannot be said to be permanent or have fixity, which is voyaged from place to place for a market."

But when this coal reached the place for market its journey was ended. It became intermingled with the general mass of property of that State and did have fixity. Furthermore, it did not "go exempt from the imposition of further burdens elsewhere for State purposes for the year specified." On the contrary, it was clearly subject to taxation in the States where located. It was within the protection of their laws—absolutely within their dominion and beyond the power of Pennsylvania either to protect or to regulate and control. The trial judge further said: "Coal mined or unmined, as well as the proceeds of the sale of the product, are protected by the laws of this State and must accordingly respond to the burden of taxation in this State. Protection and taxation are co-related." But what protection could the laws of Pennsylvania give to coal located in Buffalo, or in Chicago, or in Canada? The learned justice who wrote the opinion of the Supreme Court has substantially adopted the reasoning of the trial judge. He says of the coal that "when shipped out of the State

it is for the purpose of sale and not for permanent storage. As fast as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury." He approves of the statement of the trial judge that "it is not a thing used in the prosecution of the business of the company" and adds that "the business is prosecuted that the coal may be sold and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business. This is the limit of exemption from taxation here and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers." He concedes that the real estate upon which the coal was stored, being necessary to enable the company to deal in coal, is exempt but insists that the coal itself is not exempt. The business of the company being to mine and sell coal, it would seem that the coal itself is at least as essential to that business as the real estate constituting the yard in which it is held for sale.

It is submitted, however, that the real question is not whether the coal is essential to the conduct of this company's corporate business, but whether by reason of its location in other States it is within the protection, and subject to the correlative power of taxation, of the State of Pennsylvania; or was within the protection and subject to the taxing power of the State or States in which it actually was at the time of the assessment and part of whose general mass of property it had become. This precise question first arose in *Commonwealth* v.

Pennsylvania Coal Company, 197 Pa., 351, which case, by reason of a subsequent compromise, did not reach this Court. In that case it was not shown that the coal had actually been taxed in the other States where located, and the Court likened that, as the trial Court has likened this case, to one feature of *Commonwealth* v. *American Dredging Co., 122 Pa., 386,* where, as hereinbefore shown, it was held that the facts relating to certain dredges, and scows, belonging to the dredging company took it out of the general principle that tangible property could not be taxed by a State when not actually therein. Upon that point the Court, in the *Dredging case,* said (p. 391):

"It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State, it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business, it is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or inter-state commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered: *Pullman Palace Car Co. 29 Fed. Rep., 66; Hays* v. *Pacific Mail Steamship Co., 17 How., 596.* These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another State as to be liable to taxation under the laws of that State."

But there is a vast difference between dredging boats and scows floating upon the surface of the water, used

to dredge one stream or harbor to-day and another to-morrow, and coal which is mined, not for the purpose of being used one day in one place and the next day in another place, but is either sold at the mine or else shipped from the mine directly to the place of market. If there were no other reason, the cost of its handling and transportation would prevent it from ever possessing that "itinerant trait" which has been bestowed upon it for the purpose of likening it to that feature of the *Dredging case.* Furthermore, it is taken out of the reasoning of the *Dredging case* by the fact that there *is* here something to show that the coal is "so permanently located in another State as to be liable to taxation under the laws of that State." The evidence and the facts judicially found show that it has been actually taxed in the States where located and that the tax has been paid. No argument is needed to show that it was properly taxable there. That question has been clearly and distinctly ruled by this Court in *Brown* v. *Houston, 114 U. S., 622,* where, as stated in the syllabus, it was held that —

"Coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the State of Louisiana, and is subject to taxation under general laws of that State, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port."

In that case, as appears from the opinion of the Court, the coal had never been unloaded from the boat,

but "that when said assessment was made, the said coal was afloat in the Mississippi River in the parish of Orleans, in the original condition in which it was exported from Pennsylvania" (p. 624), and that "having just arrived from Pittsburg, Pennsylvania, by flat-boats, and was on said boats in which it arrived and afloat in the Mississippi River; that it was held by Brown & Jones to be sold for account of the plaintiffs by the boat load, and that since then more than half of it had been exported from this country on foreign steamships and the balance sold into the interior of the State for plantation use by the flat-boat load."

Mr. Justice Bradley delivering the opinion of this Court, said (p. 629):

"Being in New Orleans and held there for sale without reference to the destination or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer to foreign ports, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans."

Writing for the whole Court, the learned justice held that defendant's taxation was not a regulation of interstate commerce or foreign commerce, nor a duty on exports, and added (p. 632):

"As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisi-

ana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated.

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale."

The case at bar is stronger than *Brown* v. *Houston*. There the coal had not been unloaded from the flatboat in which it had been transported from Pennsylvania into Louisiana. The owners denied, but this Court held, that "it had become a part of the general mass of property in the State." In the case at bar the coal had been unloaded and was stored by the plaintiff in error awaiting sale at retail. It is admitted and found as a fact by the trial court that "said coal was intended to and did become part of the general mass of property in said other States and the Company is there annually taxed upon and in respect to the same and was so taxed for 1899, and that the tax

has been paid." Independent of this finding, the coal clearly was—more clearly if possible than in *Brown* v. *Houston*—a part of the general mass of property in the State in which it was located. It was within the protection of the laws of the States where located—absolutely within their dominion and in no way within the authority or jurisdiction of the laws of Pennsylvania from which, after its removal from said State, it could receive no protection whatever.

And *Brown* vs. *Houston* has been affirmed and reaffirmed over and over again.

In *Coe* vs. *Errol, 116 U. S., 517,* it was held, as stated in the syllabus, that

"Goods, the product of a State, intended for exportation to another State, are liable to taxation as part of the general mass of property of the State of their origin, until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose; the carrying of them to, and depositing them at, a depot for the purpose of transportation is no part of that transportation.

"When goods, the product of a State, have begun to be transported from that State to another State, and not till then, they become the subjects of inter-state commerce, and, as such, are subject to national regulation, and cease to be taxable by the State of their origin."

According to this ruling, the coal in question ceased to be taxable by the State of Pennsylvania the instant the cars into which it was loaded at the mine began to move upon their inter-state journey, and it became taxable the instant it reached the State of its destination and was there placed in stock awaiting sale. It had

then become part of the general mass of property of that State.

In the case last cited it was held that logs cut in Maine, which had commenced their inter-state journey through New Hampshire to a point in another State, were not taxable in New Hampshire because in the course of inter-state transportation, but that logs cut in New Hampshire and hauled to the town of Errol, on the Androscoggin River, in that State, to be subsequently transported from thence upon the river to a point in Maine, but which were held at Errol for a convenient opportunity for such transportation, had not yet started upon their inter-state journey, and not having left the State of New Hampshire, had not ceased to be a part of the general mass of its property and were therefore still taxable in that State. Mr. Justice Bradley, delivering the unanimous opinion of the Court, said (p. 525):

"This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation."

The coal here sought to be taxed by the State of Pennsylvania was, upon this reasoning, under the protection of the Constitution and free from taxation in

Pennsylvania, "when actually started in the course of transportation to another State, or delivered to a carrier for such transportation." But when the tax in controversy was assessed it had gone farther than that. It had not only actually started upon, but had actually ended, its journey, and was stored in coal yards in other States and was there awaiting sale.

Mr. Justice Bradley continued (p. 525):

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State."

It may be conceded that if this coal were stored at the mines in Pennsylvania, awaiting shipment to another State, it would still be taxable as part of the general mass of property in Pennsylvania, but, as already shown, its transportation to another State had not only

begun but had actually ended. Mr. Justice Bradley (p. 526) pointed out that the mere fact that goods were intended for exportation from one State to another country or State did not relieve them from taxation in the State of their origin "until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place." He declared that it was not easy to designate or to find the precise moment of time when State jurisdiction begins and ends for commodities of commerce, although declaring it important to the shipper and to the State that the question should be so defined as to avoid ambiguity.

He further said (p. 527):

"This Court, as before stated, has since held that goods transported from one State to another are not imports or exports within the meaning of the prohibitory clauses before referred to; and it has also held that such goods, having arrived at their place of destination, may be taxed in the State to which they are carried, if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the State from another State, nor subjected in any way to unfavorable discrimination. *Woodruff* v. *Parham, 8 Wall., 123; Brown* v. *Houston, 114 U. S., 622.*

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common

carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject."

In *Pittsburg & Southern Coal Co.* v. *Bates, 156 U. S., 577*, it was held, as stated in the syllabus, that—

"Coal, shipped by the owners at Pittsburg in their own barges to Baton Rouge for the purpose of being sold there or sent thence to supply orders, and moored at Baton Rouge in the original barges in which it was shipped to Pittsburg, is subject to local taxation there as a stock in trade, and such imposition of a tax violates no provision of the Constitution of the United States. *Brown* v. *Houston, 114 U. S., 622*, affirmed and applied to this case."

Mr. Justice Field, delivering the opinion of the Court, said (p. 589):

"The decision of the Court in *Brown* v. *Houston*, thus rendered, seems to be conclusive of the case now before the Court. The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

In *United States* v. *Knight Co., 156 U. S., 1-13*, Mr. Chief Justice Fuller cited approvingly *Coe* v. *Errol*, and quotes from Mr. Justice Bradley's opinion, as follows (p. 13):

"Does the owner's state of mind in relation to the

goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. * * * There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

In *Kelley* v. *Rhoads, 188 U. S., 1,* it was held that a herd of sheep, driven from a point in Utah and across the State of Wyoming for the purpose of reaching a point in Nebraska, were not taxable in Wyoming, being the subjects of inter-state commerce and not becoming intermingled with the general mass of property of Wyoming; but the principles ruled in the cases above cited were recognized and affirmed as correct by Mr. Justice Brown, who, in delivering the opinion, said (p. 5):

"The law upon this subject, so far as it concerns interference with the inter-state commerce, is settled by several cases in this Court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities. *State* v. *Engle, 34 N. J. Law, 425; Standard Oil Co.* v. *Bachelor, 89 Indiana, 1; Burlington Lumber Co.* v. *Willetts, 118 Illinois, 559.*

"The first case in which the question arose is that of *Brown* v. *Houston, 114 U. S., 622,* in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in the open market there on account of the owners in Pennsylvania, and lying at New

Orleans in flat-boats for sale, became intermingled, on its arrival there, with the general property of the State, and was subject to taxation under the general laws of Louisiana, although it might have been, after arrival, sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country by a vessel bound to a foreign port. The case was affirmed in *Pittsburg, &c., Coal Co.*, v. *Bates, 156 U. S., 577*, which differed from the former only in the fact that the coal did not reach New Orleans, the port of destination, but was still on the Mississippi river, nine miles above Baton Rouge, where it was held for sale. It appeared that the boats were held subject to the orders of plaintiff to be navigated to such place or places as he might deem convenient or advantageous to the trade in which he was engaged.

"In *Coe* v. *Errol, 116 U. S., 517*, it was held that logs cut in New Hampshire, which were hauled down to the town of Errol on the Androscoggin River in that State, to be thence floated down the river to Lewiston, Maine, and were waiting a convenient opportunity for such transportation, were still a part of the general mass of property of the State liable to taxation, if taxed in the usual way in which such property was taxed in that State. It was a stipulated fact that the timber thus cut had lain over one season, being about a year, in the Androscoggin River in that State either in Errol, Dummer or Milan; and that other timber referred to in the petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation. The question is thus stated by Mr. Justice Bradley: 'Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?' Said he: 'There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for

this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. * * * Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there.'

"The substance of these cases is that, while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of inter-state commerce and is exempt from local assessment."

In *Diamond Match Co.* v. *Ontonagon, 188 U. S., 82,* this Court held that logs cut in Michigan and held in that State remained part of the general mass of property of that State and were there taxable, although it was the intention to take them down the river to another State at some future time. The principle enunciated in the above cited cases was, however, sustained, Mr. Justice McKenna, who delivered the opinion, saying (p. 93):

"The power of the State to tax everything which is part of what has been called 'the general property' or 'the general mass of property' of the State, is undoubted. But things which have been brought to a State may not have reached that condition. Things intended to be sent out of a State, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out—may be confused by circumstances, and the confident assignment of the property as subject or not subject to taxation is not easily made. Fortunately we are not without illustrations in prior cases, and in *Kelley* v. *Rhoads, p. 1, ante,* decided concurrently with this, we express the principles of decision.

"In *Brown* v. *Houston, 114 U. S., 622,* the property (coal in barges) had reached the State, but was yet in the boats in which it had been brought into the State. While on the barges it was offered for sale. It was held it had become part of the property of the State and was subject to taxation. *Pittsburg, &c., Coal Co.* v. *Bates, 156 U. S., 577,* had facts assimilating it to the case at bar, and it was affirmed on the authority of *Brown* v. *Houston.* As in the latter case, the tax was on coal in barges shipped from the mines in Pennsylvania, and consigned to New Orleans, Louisiana. The coal, however, had not reached, as the coal in *Brown* v. *Houston,* its exact destination. To accommodate the exigencies of the owner's business, the barges, 'about one hundred in number, were stopped and moored in the Mississippi River at a convenient mooring place about nine miles above the port of Baton Rouge.' The coal was held subject to taxation."

He also cited approvingly (p. 95) the declaration of Mr. Justice Bradley in *Coe* v. *Errol,* that the true rule upon the subject is that "such goods do not cease to be part of the general mass of property within the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

As already frequently pointed out, the case at bar is stronger than any of those cited. The transportation of the coal from Pennsylvania to another State had not only begun, but ended. The coal was at rest awaiting sale at its place of destination, not only subject to taxation but actually there taxed. All dominion of the State of Pennsylvania over this coal ceased the instant that its inter-state journey began. When that journey

was ended and the coal unloaded and stored in the yards at Buffalo, for instance, it became intermingled with, and part of, the general mass of property in New York, where, and not in Pennsylvania, it was taxable.

This very principle has been sustained by the Supreme Court of Pennsylvania in *Finley* v. *The City of Philadelphia, 32 Pa., 381,* where it was held, as stated in the syllabus, that—

"The household furniture of a surgeon in the Army of the United States, is liable to taxation in a city where he is stationed on duty, without the intention of acquiring a domicile."

The claim of the surgeon, as stated in the opinion of the Court, was "that this property ought to be exempt because he is a surgeon in the United States Army, stationed here on duty and with no intention of acquiring a domicile in this State or of remaining in it after he shall be relieved from duty."

Chief Justice Lowrie, delivering the opinion, said (p. 382):

"Is this a valid ground of exemption? We think not. There is nothing very poetic about tax laws. Wherever they find property, except what is devoted to public and charitable uses, they claim a contribution for its protection, without any special respect to the owner or his occupation, and without reflecting much on questions of generosity or courtesy.

* * * * * * * * * * * * * *

"The officer's household furniture, not within army quarters, stands as much in need of State protection as any other kind of property, or as the property of any other person."

It is manifest that under that ruling the State of

Pennsylvania would, if conditions were reversed, insist upon taxing coal mined in New York, Illinois or any other State, and brought within her borders and within her protection, and that her Courts would sustain such taxation. It is difficult, therefore, to understand upon what principle they hold that coal mined within her borders, but subsequently transported to and becoming intermingled with the general mass of property in other States, is still subject to her protection and power of taxation and not subject to the dominion and power of taxation of the States of whose general mass of property it has now become part.

IV. The taxation of property having its situs in another State is in violation of the Federal Constitution.

The statute, both upon its face and as construed by the Courts of the State, negatives the intention of taxing tangible property located and taxable in other States. It is equally clear that even if her legislature should so expressly enact, Pennsylvania could not enforce a tax upon coal mined within her borders after it had become part of the general mass of property of another State. Such taxation would not only be a violation of inter-state comity, but as well a violation of the Federal Constitution. It would, indeed, in cases such as this, be an interference with inter-state commerce. As has frequently been held, the power to tax,

involves the power to destroy. If Pennsylvania has the right in a case like this to impose any tax at all, she may impose such a tax as absolutely to prevent the shipment of coal beyond her borders. The 8th specification of error involves that proposition, but independently of that, the attempted taxation is in violation of a necessary implication of the Constitution which restrains the power, authority and jurisdiction of each State to persons, property and business within its territorial limits. In *McCulloch* v. *Maryland, 4 Wheat., 316*, there was no claim that the taxation sought to be imposed by the State violated any express provision of the Constitution, but that it was contrary to "a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."

What was that principle? The self-evident one that the objects of State taxation are those and those alone over which the sovereign power of the State extends.

Said Chief Justice Marshall (p. 429):

"It may be exercised upon every object brought within its jurisdiction.

"This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

* * * * * * * * * * * * * *

"If we measure the power of taxation residing in a

State, by the extent of sovereignty which the people of a single State possess, and can confer on its Government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one Government to pull down what there is an acknowledged right in another to build up, from the incompatibility of a right in one Government to destroy what there is a right in another to preserve."

The learned Justice continued further: That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one Government a power to control the constitutional measures of another, and showed how the whole principle of our Government would be disastrously altered if such taxation were allowed. He there applied the principle to the matter of taxation by a State, of property of the United States, but the principle applied was that a State has no power of taxation of property over which it has no jurisdiction.

In *St. Louis* vs. *Ferry Co., 11 Wall., 423*, this Court held that ferry boats of a corporation of one State, carrying passengers forward and backward across the river to a city in another State, did not obtain a taxable

situs in and were not taxable by that city, and Mr. Justice Swayne, delivering the opinion said (p. 430):

"If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *Hays v. Pacific Mail Steamship Co., 17 How., 596,* this Court denied the right of the State of California to tax vessels owned and registered in New York, but temporarily docking in California, Mr. Justice Nelson, who delivered the opinion of the Court, saying (p. 599):

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation. They were not properly abiding within its limits so as to become incorporated with the other personal property of the State."

Here the State of Pennsylvania is trying to tax property which has become incorporated with the property of another State.

In *Case of the State Tax on Foreign-held Bonds, 15 Wall., 300,* it was, as stated in the syllabus, held that—

"The power of taxation of a State is limited to persons, property and business within her jurisdiction. All taxation must relate to one of these subjects."

And that

"The tax laws of a State can have no extra-territorial operation."

It was in that case decided that bonds issued by a Pennsylvania corporation and secured by mortgage upon property within that State were, nevertheless, not taxable by the State when held and owned beyond her territorial limits. Said Mr. Justice Field, delivering the opinion (p. 319):

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

And again (p. 325):

"We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the Company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation."

Referring to the case of *Railroad Co.* v. *Jackson, 7 Wall., 262*, the learned Justice criticised to some extent the reasoning by which the Justice who had delivered the opinion in that case reached certain conclusions, but said (p. 319): "The decision is nevertheless authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. In-

deed it would seem that no adjudication should be necessary to establish so plain a proposition."

In *Pullman's Car Company* v. *Pennsylvania, 141 U. S., 18,* this Court recognized the right of Pennsylvania to tax personal property—sleeping and parlor cars—used within her borders, but owned by a corporation of Illinois. Mr. Justice Gray, who delivered the opinion, said (p. 22):

"The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

"No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed by the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used. *Green* v. *Buskirk, 5 Wall., 307, and 7 Wall., 139; Hervey* v. *Rhode Island Locomotive Works, 93 U. S., 664; Harkness* v. *Russell, 118 U. S., 663, 679; Walworth* v. *Harris, 129 U. S., 355; Story on Conflict of Laws, Sec. 550; Wharton on Conflict of Laws, Secs. 297-311.* As observed by Mr. Justice Story, in his commentaries just cited, 'although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual

situs of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'

"For the purposes of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax."

In view of this ruling, which sustained the decision of her own Courts, Pennsylvania, having established her right to tax tangible personal property used within her limits though owned by citizens of other States, is hardly in position to consistently deny to other States the right to tax property there located though owned by citizens of Pennsylvania. After taxing all property, real and personal, within her own territorial limits, she ought to be content without striving to collect a tax upon property located and used in other States. As already shown, the rule of inter-state comity, as well as the constitutional requirement, is that each State shall tax only what is within her own territorial jurisdiction, thus avoiding the inevitable conflict which must result if two or more States claim jurisdiction and taxing authority over the same property. In the case last cited, this Court not only defined the limits but as well the character of the particular tax in question, Mr. Justice Gray saying (p. 25): "The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property." As the Pullman cars were used in several

States, the proportionate value taxable in Pennsylvania was ascertained upon a mileage basis, concerning which this Court said (p. 26):

"The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."

In the case at bar, the coal has already been taxed once upon its full value in the States where located and if this pending claim shall be sustained, a second tax upon the same property will have been collected by the State of Pennsylvania.

The ruling in the *Pullman case* is cited approvingly in the opinion of Mr. Chief Justice Fuller, in *Adams Express Co.* v. *Ohio, 165 U. S., 194,* and also in the opinion of Mr. Justice Brewer, in denying a re-hearing in *Adams Express Co.* v. *Ohio, 166 U. S., 185.* In the latter case the learned Justice said (p. 224):

"It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was *'mobilia personam sequuntur,'* but that maxim was never of universal application, and seldom interfered with the right of taxation. *Pullman's Palace Car Co.* v. *Pennsylvania, 141 U. S., 18, 22;*"

and its application in that case was denied even as to the intangible property, the taxation of which was there involved.

The *Pullman case* was again affirmed in *American Refrigerator Co.* v. *Hall, 174 U. S., 70.*

In conclusion, it is submitted—

First. That the coal in question was, at the time of its assessment for purposes of taxation, beyond the jurisdiction of the State of Pennsylvania and had become incorporated into the general mass of property of the respective States in which it was located.

Second. That it was not the intention of the statute either as expressed, or as construed by the Courts of the State in other cases, to tax tangible property permanently beyond the limits of the State and which had acquired a situs for taxation and was actually taxed in another State or States.

Third. That the fact that the coal was originally mined in Pennsylvania does not confer upon that State the power to tax it after it has been permanently removed therefrom, transported into and become part of the general mass of property of another State.

Fourth. That the attempted collection of a tax upon property under such circumstances is in violation of the commerce clause of the Federal Constitution.

Fifth. That, in any event, the attempted taxation, by the State of Pennsylvania, of coal which has become part of the general mass of property of another State, is in violation of a necessary implication of the Federal

Constitution which restrains the power, authority and jurisdiction of each State to subjects within her territorial limits.

M. E. Olmsted,
Walter W. Ross,
A. C. Stamm,
Attorneys for Plaintiff in Error.